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In *Konigsberg*[1] and *Schware*[2] this Court made clear that state exclusion of applicants to state bars done by standards or methods that were arbitary or discriminatory presented Fourteenth Amendment problems under the due process and equal protection clauses. In *Theard*[3] the Court observed that these cases laid down the limits for review in state "disbarments". These cases establish the basis for action here. *Konigsberg* and *Schware* reviewed state action against the contention (similar to that made by Petitioner here) of arbitary fact finding. In both cases the Court held that the evidence must "rationally support" the findings against the lawyer. The contention that due process of law has been denied by findings not so supported has of course long been recognized as the cases cited in the Petition (p. 25) and in the dissent (App. A, pp. 42-44) so plainly demonstrate.

Similarly as to claims such as Petitioner's here, that local action has offended free speech. While in *Konigsberg* this Court found it unnecessary to reach the First Amendment problems presented, it seems clear that it felt its review would reach such questions if necessary. (353 U. S. at 261, 269, 273.) In *Barnette, supra,* First Amendment protection was accorded grade school children expelled by their local school board. Petitioner is equally entitled to the protection of the federal constitution—the more so because the failure to give her that protection will adversely affect the independence of the entire American bar.

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[1]353 U. S. 252.

[2]353 U. S. 232.

[3]354 U. S. 278, 281.

Petitioner has properly presented federal questions because she has demonstrated that the action below has contravened specific protections afforded by the federal constitution. In addition she has pointed to two other questions (Nos. 3 and 4, see Petition, pp. 3, 27-33) involving the supervisory powers of this Court. In deciding the one numbered three the court below established principles binding upon at least all federal courts in the Ninth Circuit and perhaps for the country as a whole. The decision of number four affects the relationship of the federal judiciary to the court systems of all Territories. In no sense is this cause a "local, territorial" matter.

2. In connection with Petitioner's free speech points, Respondent (Br. pp. 7-10) urges that the clear and present danger test has no application. Petitioner's position is that this test or some other rubric by which speech is balanced against legitimate interests of the state must apply to vouchsafe to Petitioner and lawyers generally the minimal protections of the First Amendment. Petitioner's position is that *Bridges*, *Pennekamp* and *Craig* apply here because these utterances were made outside the court room, not in the court room.[4] Respondent's only authorities for its novel and unsupported position to the contrary are the *Sacher*[5] and *Fisher*[6] cases, wherein the lawyers' utterances and conduct occurred in the courtroom and in the face of the judge. No one would contend that the same standards govern the lawyer's right to

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[4]Petitioner concedes that as a lawyer she was under limitations of speech not imposed on laymen generally. These deal with maintaining the respect due the courts. The speech here involved did not transgress these limitations. (Pet. pp. 26-27.)

[5]343 U. S. 1.

[6]336 U. S. 155.

address an audience gathered in a theatre and his right to make remarks in the face of the court which violate the judge's rulings.

3. Petitioner does not, as respondent suggests, seek to have this Court substitute its judgment for the fair-minded judgment of lower courts on disputed facts. (See Resp. Br. p. 22 ff.) Petitioner claims, *inter alia*, that she has been deprived of significant First and Fifth Amendment protections by arbitrary fact finding. The assertion of such a claim calls for this Court's reappraisal of the evidence. *Konigsberg, supra; Schware, supra; Norris v. Alabama*, 294 U. S. 587; *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287. See also cases cited in dissent below. (App. A, pp. 42-44.) We seek here no resolution of factual conflicts. There are no real conflicts in the evidence. We take it at face value and assert that the findings and conclusions of either of the lower courts. (Pet, pp. 21-26, 8-10; Appendix G to Petition at pp. 78-82; see also dissent below, App. A, pp. 45-50.)

Thus, contrary to Respondent's interpretation of Petitioner's position (Br. pp. 24-28), Petitioner does not present a factual issue as to whether her speech was directed to the Honolulu Smith Act trial before Judge Wiig. We of course assert that it did speak of that trial and that it spoke critically. We do not contend that taking all the evidence on its face, nothing in that speech attacked Judge Wiig for wilful partiality or lack of integrity. Petitioner's criticisms of the trial pertained to the conduct of the government and its prosecutors, the F.B.I. and its informer witnesses, the dangers of a sedition statute and of the conspiracy theory. In this she voiced criticisms that inhered in the nature of a trial for conspiracy to violate the Smith Act during the fear-ridden

days of the cold war. The words of the dissenting judges well state our position:

> "This record does not warrant a conclusion that the integrity of Judge Wiig was attacked. Everything in it is consistent with appellant's position that the speech was directed at Smith Act prosecutions and the Smith Act, and not at Judge Wiig personally. Some of the remarks quoted in the notes she denied making, but I assume for the purposes of this opinion she made all of them, just as the notes show." (App. p. 47.)
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> "What we have here is an attack on the methods used in all Smith Act prosecutions, including the one then pending and hence, implicitly an attack on the Smith Act itself." (App. p. 45.)

4. Respondent builds its argument mainly upon a finding anent a remark about scrapping all the rules of evidence. (Br. pp. 32-34.) This, it contends, necessarily shows that Petitioner attacked Judge Wiig's integrity. But the court below did not find that remark to have been made at all. (App. A, p. 14.) In this the court below appears not to have sustained the territorial court. (*Cf.* R. 117.] The only finding close to this made by the court below was "that 'they' just made up the rules as 'they' went along." In the Petition (p. 24) it was pointed out that of all the witnesses whose testimony bore on this point, four used the noun government as the subject of the sentence and two (including Matsuoka in his "notes") used the pronoun "they". To convert such testimony into a reference to the judge is a sample of what Petitioner contends is arbitrary fact finding.

However if the finding of the territorial court about scrapping the rules of evidence is still in the case, it too

is a product of arbitrary fact finding. The evidence is that Petitioner said "all rules of evidence *have to be* scrapped or the government can't make a case". (Matsuoka "notes", Resp. Br. App. p. vi.) The territorial court transmuted the statement to read "all the rules of evidence *were being* scrapped so the government could make its case". [R. 117.][7] So framed the remark more nearly appears to be directed at what the trial judge was then doing in the *Fujimoto* trial. But the evidence does not have it that way and the context of the remark shown by the notes plainly indicate that Petitioner addressed herself to the problems of the all-encompassing breadth of conspiracy trial evidence. (See dissent below, App. A, p. 49.) Respondent's opposition to the Petition rests on the same arbitrary treatment of the evidence as does the finding of the territorial court.

5. Finally, Respondent deals with the remark about creating a new crime. (Br. pp. 33, 34.) The finding of the court below was this:

> "That unless the Smith Act trial at Honolulu was stopped in its tracks there would be a new crime—people will be charged with knowing what is included in books." (App. A, p. 14.)[8]

Petitioner claims that to make of this an attack upon Judge Wiig's integrity is arbitrary fact finding. For it is obvious that Petitioner was saying that prosecutions of this kind threaten to result in the definition of a new crime, thought control. She in no wise attacked Judge Wiig.

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[7]Emphasis added in each instance.

[8]The only evidence on this point is found in Matsuoka's "notes". (See Resp. Br., App. p. vii.)

Respondent (Br. pp. 33, 34) sets out the finding in the words of the territorial court thus:

> ". . . that unless the trial was stopped in its tracks certain new crimes would be created." [R. 117.]

That is plain distortion of the evidence by truncation, for it omits the second half of the sentence which gives the meaning of the whole.

Given either version of the finding, Petitioner was gravely deprived of due process.

6. Assessing the four remarks found by the court below (App. A, p. 14), those numbered 1, 2 and 4 have support in the evidence, but to hold them to be an attack on the trial judge impugning his integrity is arbitrary and without rational support. The finding numbered 3, glossed as it is to make "they" include the trial judge, is plainly contrary to the evidence. Turning to the five remarks found by the territorial court the first, second and fourth have evidentiary support but do not rationally justify the inference that they impugned Judge Wiig's integrity. The third constitutes, as indicated above, a metamorphosis of the evidence, and the fifth a mutilation of it.

This is a classic situation in which the Court makes its own appraisal of the evidence to see that it "rationally justifies" the findings *(Konigsberg* and *Schware, supra)*, to see that "no constitutional freedom, least of all the guaranties of the Bill of Rights, be defeated by insubstantial findings screening reality." *(Meadowmoor, supra,* p. 293.)

Respectfully submitted,

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